INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitution, statute, and rule involved	2
Statement	3
Argument	10
Conclusion	15

CITATIONS

Cases:

Beaty v. *United States*, 213 F. 2d 712, certiorari granted and remanded, 348 U.S. 905	11
Bowles v. *United States*, 73 F. 2d 772, certiorari denied, 294 U.S. 710	10
Buttermore v. *United States*, 180 F. 2d 853	14
Capone v. *United States*, 51 F. 2d 609, certiorari denied, 284 U.S. 669	14
Chadick v. *United States*, 77 F. 2d 961	14
Dennis v. *United States*, 171 F. 2d 986, certiorari denied, 339 U.S. 162	11
Gleckman v. *United States*, 80 F. 2d 394, certiorari denied, 297 U.S. 709	13
Guzik v. *United States*, 54 F. 2d 618, certiorari denied, 285 U.S. 545	14
Jelaza v. *United States*, 179 F. 2d 202	14
Kersten v. *United States*, 161 F. 2d 337, certiorari denied, 331 U.S. 851	11
Kirsch v. *United States*, 174 F. 2d 595	14
Malone v. *United States*, 94 F. 2d 281, certiorari denied, 304 U.S. 562	14
Oliver v. *United States*, 54 F. 2d 48, certiorari denied, 285 U.S. 543	14
Orzechowski v. *United States*, 37 F. 2d 713	14
Paschen v. *United States*, 70 F. 2d 491	14
Rakes v. *United States*, 169 F. 2d 739	11

Cases—Continued

	Page
Singer v. *United States*, 58 F. 2d 74	14
Spies v. *United States*, 317 U.S. 492	10
Stinnett v. *United States*, 173 F. 2d 129, certiorari denied, 337 U.S. 957	13
United States v. *Albanese*, 117 F. Supp. 736	11
United States v. *Johnson*, 323 U.S. 273	11
United States v. *Lombardo*, 241 U.S. 73	10, 11
United States v. *Miro*, 60 F. 2d 58	14
United States v. *Venuto*, 182 F. 2d 519	13-14
United States ex rel. Wampler v. *Hill*, 8 F. Supp. 469, affirmed, 74 F. 2d 940	10
United States v. *Warring*, 121 F. Supp. 546	10
United States v. *Zimmerman*, 108 F. 2d 370	14
Wampler v. *Snyder*, 66 F. 2d 195	10

Constitution:

Constitution of the United States, Sixth Amendment	2

Statutes:

Internal Revenue Code of 1939, Sec. 145 (26 U.S.C. 1952 ed., Sec. 145)	3
18 U.S.C. Sec. 3237	11

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 18	3

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 648

J. L. HOLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 358) is reported at 216 F. 2d 238.

JURISDICTION

The judgment of the Court of Appeals (R. 358) was entered on October 29, 1954, and a petition for rehearing was denied on February 8, 1955 (R. 375). The petition for a writ of certiorari was filed on March 10, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Petitioner was indicted and convicted in the Atlanta Division of the United States District Court for the Northern District of Georgia for having wilfully attempted to defeat and evade a large part of his federal income taxes for the calendar year 1945 by filing a false and fraudulent income tax return at Atlanta, Georgia, in the Atlanta Division of the Northern District. The indictment alleged that the false and fraudulent return was filed in the Atlanta Division. Petitioner resided, carried on business, and had his tax return prepared in the Gainesville Division of the same District. The questions presented are:

1. Whether venue was properly laid in the Atlanta Division.

2. Whether the evidence was sufficient to support the verdict.

CONSTITUTION, STATUTE, AND RULE INVOLVED

Constitution of the United States:

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;

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to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

RULE 18. DISTRICT AND DIVISION

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was com-

mitted, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.

STATEMENT

On December 11, 1951, an indictment was returned against petitioner in the Atlanta Division of the United States District Court for the Northern District of Georgia charging him with wilfully attempting to evade his income taxes for 1945 by filing a fraudulent return with the Collector of Internal Revenue at Atlanta, in violation of Section 145(b) of the Internal Revenue Code of 1939. (R. 1-2.) The amounts of net income and the tax due thereon, as reported and as corrected, are as follows:

	Reported		Corrected	
	Income	*Tax*	*Income*	*Tax*
1945	$666.83	$5.01	$21,376.06	$8,096.87

Petitioner filed a motion to dismiss the indictment for lack of jurisdiction on the ground that his return was prepared and executed, and all pertinent books and records were kept, in the Gainesville Division of the Northern District of Georgia instead of in the Atlanta Division where the indictment was filed. In the alternative the motion prayed that, in the interests of justice, the trial be transferred to the Gainesville Division where petitioner resided and carried on his business and where his witnesses were located. (R. 3-5.) The motion was denied. (R. 5-6.) After a jury trial petitioner was found guilty as charged, and on

January 22, 1954, he was sentenced to imprisonment for a year and a day and fined $1,500. Execution of the prison sentence was, however, suspended and petitioner was placed on probation for two years. (R. 341-343.)

The evidence to support the verdict may be summarized as follows:

Petitioner and his father-in-law, Stripland, operated a chicken business in partnership, petitioner carrying on most of the activity since Stripland was old and infirm. (R. 231, 254-257, 266, 305.) The partnership bought baby chicks, sold them to growers in the rural community in which they lived, sold the growers feed and medicine while the chicks were maturing, and finally bought them back when they had reached the broiler stage and resold them to packing plants. (R. 25-37, 110, 129, 141, 255-256, 259, 279-284.) When the chicks were sold to the growers the partnership made, at least in some instances, a profit of a penny a chick. (R. 28, 290.) When the matured broilers were later resold to the poultry plants, the partnership charged a penny a pound in excess of the price they paid the growers, but some of this profit was dissipated by shrinkage in the weight of the chickens during transportation from the growers' farms to the packing plants. (R. 281-284.) The partnership also operated a small grocery store. (R. 278.) Petitioner had the reputation of being a successful business man. (R. 75.) During 1945 he was a member of the Georgia Legislature, taking an

active part in the work of several committees, and subsequently he was a state food and feed inspector, a position which required him to make daily written reports. (R. 268-269.)

Petitioner's income tax returns and those of the partnership were prepared from 1942 through 1945 by an attorney named Oliver. Oliver never saw any of the books and records of the partnership and prepared the returns entirely from information supplied by petitioner, but he questioned petitioner as to all sources of income and devised a system of reporting the income based on the number of chicks and bags of feed sold, the margin of profit on each, and the expenses other than cost of goods. (R. 23-27, 41-43, 46-47, 50, 258-259, 316-317.) Petitioner told Oliver that no profits were realized from the sale of the matured chickens to the packing plants. (R. 26-27, 281-284.) The 1942 and 1943 returns reported profits from sales of baby chicks and feed to the growers, and from the grocery store. (R. 28-29.) Oliver testified that the information he received was that the only income for 1945 was derived from the sale of 19,200 bags of feed at a profit of thirty-two cents a bag, and the partnership and individual returns were prepared on that basis. (R. 29-32, 39-40, 47-48, 315-317.) Petitioner, however, testified that he had told Oliver that the partnership had sold 29,200 bags of feed and 201,000 baby chicks. (R. 260-262, 280-281.) Thus, petitioner admitted from the witness stand that the 1945 return did not report all the income received.

When the revenue agents began investigation of the 1945 returns petitioner told them that he had destroyed all the invoices covering purchases of baby chicks and feed. (R. 110, 128-129, 223.) They also discovered that, although the partnership had kept an accounts receivable ledger showing amounts due from growers for chicks and feed sold to them, this record was inconclusive and no record at all had been kept of cash sales to growers. (R. 110-111, 223, 225, 276.) Petitioner told the agents that all partnership receipts had been deposited in the bank with the exception of some cash receipts which were paid out to laborers, and the agents found that the partnership had regularly made large deposits to its account throughout the year.[1] (R. 114, 129-130, 184.) In view of the lack of adequate records of receipts and expenditures the agents made an analysis of the partnership's bank deposits and canceled checks for 1945. (R. 113-114.)

Examination of the account showed checks deposited in the amount of $345,605.29. Of this total $291,409.69 clearly represented receipts from sales of mature chickens to two packing plants. (R. 76-78, 114-118.) Of the remaining checks totaling $54,195.60, there were a number which also obviously represented receipts from sales of poultry. (R. 117, 143-148, 163.) There had been additional deposits of $1,462 in currency, making a total of $347,067.29 deposited in the partnership account

[1] Deposits tailed off in December when the partners began to dissolve the business. (R. 113.)

during the year. (R. 114-118.) On the other hand, examination of the canceled checks drawn by the partnership against the account revealed expenditures of approximately $300,000 for merchandise purchased, labor, and other deductible items, and after allowing for certain other deductions the agents computed the net income of the partnership to be $42,745.42.[2] (R. 116-122.) Since the partners had equal interests petitioner's share was $21,372.71. (R. 123.) The partnership return had reported net income of $922.60, and petitioner reported half of this amount in his individual return. (R. 128, 136.)

The agents allowed deductions for all the partnership's canceled checks and for all withdrawals of cash from the bank account, with the exception of two checks totaling $50,000 which represented withdrawals of capital by the partners.[3] (R. 115, 118, 119, 123, 133-134, 230.) Furthermore, they discussed their findings with petitioner (R. 127, 129) and carefully eliminated from the total deposits all items which could possibly have come from any source other than current income, such as

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[2] Petitioner's computation erroneously adds accounts receivable in the amount of $22,717.32 to the total expenditures for the year 1945. (Pet. 10.) Accounts receivable are obviously not expenditures. These amounts were collected by the partnership during the year (R. 170) and, since the business was on a cash basis (R. 108-109), they were properly included in the amount of total deposits in the Government's computation.

[3] The agents actually allowed more deductions than the partnership had claimed or petitioner was able to substantiate. (R. 119-120, 122, 161, 207-208.)

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the proceeds from the sale of three trucks belonging to the partnership (R. 118). They could find no evidence that any of the other deposits represented receipts from the sale of capital assets, or additional contributions of capital by either of the partners, or returns on loans made to third parties. (132-133, 136, 166.) A great many of the deposits represented checks which the partnership had cashed as a convenience for its customers, but it was clear that the cash which was used for this purpose represented receipts from cash sales which had not been deposited in the bank but had been kept in the cash register. (R. 142-143, 156, 163-165, 172, 191, 231.) Petitioner told the agents that the partnership had built up a large bank balance during the year through the collection of accounts and that the partners then drew out $50,000 because they did not want the money to remain idle. (R. 124-127, 132.)

Although petitioner admitted at the trial that considerable amounts of partnership income had not been reported (*supra*, p. 6), he sought to blame Oliver, the attorney who prepared his return, for the omissions. He did not claim or attempt to demonstrate that the unreported income shown by the Government's computation had come from some prior accumulation of funds. He admitted that the money which had been used to cash customers' checks, which were later deposited in the bank account, had come from cash sales. (R. 277-278, 307-308.) He denied that he had destroyed

his invoices and he denied that the agents had asked him for them, but he was vague as to where they could be obtained at the time of trial. (R. 284-288.)

ARGUMENT

1. Petitioner contends (Pet. 5, 12-16) that he should have been tried, not in the Atlanta Division of the Northern District of Georgia where his return was filed, but in the Gainesville Division where he resided and carried on business and where the return was prepared. The contention is without merit.

An attempt to evade income taxes, the offense here charged, can be committed in numerous ways, one of which obviously is the filing of a false return. *Spies* v. *United States,* 317 U.S. 492, 499. The act of filing a document occurs in the place where the official to whom the document must be delivered is located, *United States* v. *Lombardo,* 241 U.S. 73, 76, and it has frequently been held that the act of filing a false income tax return occurs, not where the return is prepared and mailed, but where the Collector with whom the return is filed is located. *Bowles* v. *United States,* 73 F. 2d 772, 773-775 (C.A. 4th), certiorari denied, 294 U.S. 710; *United States ex rel. Wampler* v. *Hill,* 8 F. Supp. 469 (M.D. Pa.), affirmed, 74 F. 2d 940 (C.A. 3d); *Wampler* v. *Snyder,* 66 F. 2d 195, 196 (C.A.D.C.); *United States* v. *Warring,* 121 F. Supp. 546 (D. Md.). It is clear, therefore, that the offense was committed in the Atlanta Division. Of course, pe-

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titioner might also have been indicted and tried in the Gainesville Division where most of his acts of evasion took place, since an offense which occurs in different localities may be tried wherever any of the acts occurred. 18 U.S.C. Section 3237; *United States* v. *Lombardo, supra.* But the cases which hold that a tax evader *may* be tried in his home district [4] recognize that he may also be tried where the return has been filed. *United States* v. *Johnson,* 323 U.S. 273, is not in point, for in that case the offense had been committed in only one district.

Petitioner's alternative request made in the trial court that venue be transferred to the Gainesville Division in the interests of justice was properly denied, since he failed to make a sufficient showing of the necessity for such transfer. This was a matter which rested within the sound discretion of the trial court,[5] and no showing has been made that the trial court abused its discretion in that respect.

In the circumstances, it was proper to indict and try petitioner in the Atlanta Division of the Northern District of Georgia.

2. Although the Government relied largely upon the so-called "bank deposits" theory in presenting

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[4] See *Beaty* v. *United States,* 213 F. 2d 712 (C. A. 4th), certiorari granted and remanded on other grounds, 348 U. S. 905; *United States* v. *Albanese,* 117 F. Supp. 736 (S. D. N. Y.).

[5] *Dennis* v. *United States,* 171 F. 2d 986, 992 (C. A. D. C.), certiorari denied, 339 U. S. 162; *Rakes* v. *United States,* 169 F. 2d 739, 746-747 (C. A. 4th); *Kersten* v. *United States,* 161 F. 2d 337, 339 (C. A. 10th), certiorari denied, 331 U. S. 851.

its proof of unreported income and unpaid taxes, petitioner's own admissions, both before and during the trial, were sufficient in themselves to establish that element of the offense. Admitting on the stand that a considerable portion of the partnership income had not been reported, he attempted to lay the blame on Oliver. Oliver's conflicting version of the information given him by petitioner for inclusion in the 1945 returns (*supra*, p. 6) presented a question of fact for the jury, and provided a substantial basis for the conclusion that petitioner had not only failed to report all of his net income but that he had done so wilfully. Furthermore, although the partnership bank balance was substantially the same at the beginning and at the end of 1945, it had been built up very considerably at one point during the year and the partners then each withdrew $25,000 for personal use. Petitioner admitted to the agents that this money came from the collection of accounts, and, since the business was on a cash basis, this necessarily represented current income. (R. 108-109, 124-127, 132.) There is, therefore, no merit in the contention (Pet. 5-11, 16-19) that the evidence was insufficient to support the verdict.

The Government's analysis of the partnership bank deposits and canceled checks demonstrated unreported income to petitioner of about $21,000[6]

[6] Even petitioner's own computation (Pet. 7-11), which erroneously treats accounts receivable as expenditures (fn. 2, *supra*, p. 8), results in partnership income in excess of $19,000 (Pet. 11) of which less than $1,000 was included in the partnership return (R. 13).

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(*supra*, pp. 7-8). Clearly, the existence of current unreported income may be inferred when the Government shows that the taxpayer was engaged in an income producing business, that he made periodic deposits in his bank account, and that the deposits could not have come from prior accumulations of cash or from non-taxable sources (gifts, loans, etc.) and that they did not represent withdrawals and redeposits of the same amounts. In *Gleckman* v. *United States*, 80 F. 2d 394, 300-400 (C.A. 8th), certiorari denied, 297 U.S. 709, the court said that:

> * * * if it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and, if the amount exceeds exemptions and deductions, that the income is taxable.* * *
>
> * * * * *
>
> The bank deposits and large items of receipts by Mr. Gleckman do not, therefore, stand entirely alone as the sole proof of the existence of a tax due from him, but they are identified with business carried on by him and so are sufficiently shown to be of a taxable nature.

See also *Stinnett* v. *United States*, 173 F. 2d 129 (C.A. 4th), certiorari denied, 337 U.S. 957; *United*

States v. *Venuto*, 182 F. 2d 519, 521 (C.A. 3d); *Kirsch* v. *United States*, 174 F. 2d 595, 601 (C.A. 8th).[7]

In this case, the Government's evidence, summarized in the Statement above, showed that petitioner was engaged in an income producing business which made deposits in its bank account with great regularity. The agents carefully examined the deposits to eliminate duplications and nontaxable items, and they discussed their findings with petitioner to determine whether the deposits could have come from some source other than the chicken business. Petitioner at no time claimed a prior accumulation of cash as the explanation, and the only lead he furnished was to point out to the agents that many of the deposits represented checks cashed for customers. However, the agents' analysis of the bank account showed, and petitioner admitted, that the cash which the partnership used to purchase these checks could only have come from

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[7] The bank deposits method of proof has often been used by the Government in conjunction with other methods. See *United States* v. *Miro*, 60 F. 2d 58, 59 (C. A. 2d); *Orzechowski* v. *United States*, 37 F. 2d 713, 714 (C. A. 3d); *Singer* v. *United States*, 58 F. 2d 74 (C. A. 3d); *Jelaza* v. *United States*, 179 F. 2d 202 (C. A. 4th); *Chadick* v. *United States*, 77 F. 2d 961 (C. A. 5th); *Buttermore* v. *United States*, 180 F. 2d 853 (C. A. 6th); *Oliver* v. *United States*, 54 F. 2d 48, 50 (C. A. 7th), certiorari denied, 285 U. S. 543; *Guzik* v. *United States*, 54 F. 2d 618, 620 (C. A. 7th), certiorari denied, 285 U. S. 545; *Capone* v. *United States*, 51 F. 2d 609, 619 (C. A. 7th), certiorari denied, 284 U. S. 669; *Malone* v. *United States*, 94 F. 2d 281 (C. A. 7th), certiorari denied, 304 U. S. 562; *Paschen* v. *United States*, 70 F. 2d 491 (C. A. 7th); *United States* v. *Zimmerman*, 108 F. 2d 370 (C. A. 7th).

current collections from other customers. (R. 142-143, 156, 163-165, 172, 191, 231, 277-278, 307-308.) The Government's evidence, therefore, amply supported the verdict of guilt.

CONCLUSION

The decision below is correct and presents no question calling for review. The petition for a writ of certiorari should be denied.

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